IN THE SUPREME COURT OF OHIO

National Collegiate Athletic Association Association, et al. Defendants-Appellants, v. Estate of Steven T. Schmitz, et al. Plaintiffs-Appellees.	:	Case No. 2017-0098 Appeal from the Cuyahoga Count Court of Appeals, Eighth Appellate District Court of Appeals Case No.: CA-15-103525

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INTRODUCTION

This is an obvious latent disease case, and the Eighth District properly applied the discovery rule.[1] At age 22, Steve Schmitz did not know (and could not have known) that he would later develop the neurodegenerative disease known as Chronic Traumatic Encephalopathy ("CTE"), the signature latent disease of football. That disease is completely different from the transient symptoms that arise from concussions and head impacts during games and practices in college football, particularly when the college student has no knowledge of what they might be and what they might mean. The Appellants mischaracterize the transient concussion symptoms Steve Schmitz had (and every other Notre Dame football player probably had) as a first manifestation and warning sign of CTE of which he was allegedly aware. *See* Appellants' Opening Brief at 1. This misstates and misconstrues the Amended Complaint (hereinafter "Complaint")[2] and imposes on Mr. Schmitz knowledge he never had. The Complaint, in fact, states the opposite; that is, that Steve Schmitz never realized he sustained a concussion and never realized he had been exposed to the risk of one day developing latent brain disease, and never knew that one day, after leading a normal life, he would succumb to CTE. Complaint at ¶¶ 18, 22, 64-68, 129 (P-A App. 53-54, 64, 77). This is exactly how the Eighth Appellate District (hereinafter "the Panel") read the Complaint,[3] which is the opposite of what the Appellants argue

[1] The Eighth Appellate District's opinion, affirming in part, reversing in part, and remanding to the trial court is attached as a part of Plaintiffs-Appellees' Appendix. (P-A App. 1-36).

[2] All references to the Complaint throughout refer to the Proposed Amended Complaint attached as Exhibit A to Plaintiffs' Motion for Leave to Amend (P-A App. 49-90), which was granted, deeming Plaintiffs' Amended Complaint filed (P-A App. 92).

[3] The Panel stated: "The thrust of the Complaint is not an injury for concussive and sub-concussive impacts; instead, the complaint alleges an injury in the form of CTE and other

on appeal here and have argued in every paper they have filed in connection with this matter to date.

Contrary to Appellants' assertion, the Eighth Appellate District did not expand Ohio's discovery rule at all. Rather, it applied well-known toxic exposure cases authored by this Court[4] and applied Ohio's well-established discovery rule to Plaintiffs' claims of a latent disease. The Panel also referred to several cases outside of Ohio, all of which addressed exactly the same issue and held that a dismissal at the pleadings stage was error and unfounded. (P-A App. 12-14); *Schmitz,* 867 N.E. 3d at 860-61. On that basis, the Panel reversed the trial court's one-sentence dismissal order, presumably based on the same mistaken argument Appellants advance to this Court.[5] The Panel also noted that if the Panel accepted Appellants' arguments, and Steve Schmitz had been forced to bring his claims within two years of finishing college football, when he knew nothing, had no symptoms, and had no diagnosis, his damages would have been speculative. (P-A App. 17); *Schmitz,* 867 N.E. 3d at 862-63. That is, the claim would have been non-existent, because Steve Schmitz did not have any diagnosable symptoms, injury, or disease until he was 57 years old. That is exactly why the discovery rule applies in a latent disease case such as this one.

What the Appellants are seeking is a draconian narrowing of Ohio's discovery rule so that it excludes latent brain injury cases brought by all football players, including former college

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neurological diseases that did not manifest until decades after Schmitz stopped playing football at Notre Dame." (P-A App. 14); *Schmitz v. Nat'l Collegiate Athletic Assn.,* 867 N.E. 3d 852, 861, 2016-Ohio-8041 (8th Dist. Cuyahoga 2016).

[4] *See, e.g.,* P-A App. 14-17; *Schmitz,* 867 N.E. 3d at 861-63, *citing Liddell v. SCA Servs. of Ohio, Inc.*, 70 Ohio St.3d 6, 635 N.E.2d 1233 (1994).

[5] *See* Journal Entry granting Defendants' Motions to Dismiss (P-A App. 93); Journal Entry denying Plaintiffs' Motion for Findings of Fact and Conclusions of Law (P-A App. 94).

football players like Steve Schmitz. In other words, the NCAA and Notre Dame want Ohio courts to eliminate these claims completely at the pleading stage, before discovery and a factual record exists. The Panel saw this for what it is and held (a) that there was nothing in the Complaint that showed Steve Schmitz had notice of an injury or the latent disease prior to his diagnosis, and (b) that every case cited by the Appellants in opposition to the negligence claims were summary judgment cases, not dismissals at the pleadings stage. (P-A App. 20-21); *Schmitz,* 867 N.E. 3d at 864.

The Panel also distinguished this case from the case on which the Appellants most heavily rely, the criminal assault case *Pingue v. Pingue*, 5th Dist. Delaware, No. 03-CA-E-12070, 2004-Ohio-4173. The Panel pointed to the critical difference in *Pingue*, which is that the victim of an ongoing criminal assault knew that the harm was injurious as it happened over a 28 year period, knew the cause of the harm, and knew the perpetrator. (P-A App. 18-19); *Schmitz,* 867 N.E. 3d at 863. The Panel wisely stated

> [t]he link between the injurious conduct and the known perpetrator that was clearly present in *Pingue* does not exist in this case….the complaint does not reveal that Schmitz was aware of any wrongful conduct until decades after he finished playing football. Schmitz did not know at the time he was playing football that the defendants were allegedly negligent or allegedly concealing information from him. Nor did he know that he had suffered a latent injury caused by playing football.

(P-A App. 19); *Schmitz,* 867 N.E. 3d at 863 (emphasis added).

For all of those reasons, the Panel applied Ohio's discovery rule properly and did not expand it at all. Rather, the Appellants and Amicus here seek to narrow the discovery rule to eliminate these claims before a factual record even exists.

Appellants also assert that the Eighth District erred in concluding that Ohio's four-year statute of limitations applied to Plaintiffs' fraud claims and argue that, instead, Ohio's two-year

statute of limitations for bodily injury claims should apply to all of Plaintiffs' claims. Nevertheless, as the Eighth District correctly observed, regardless of which statute applies, the discovery rule applies, and all of Plaintiffs' claims were, therefore, timely filed. (P-A App. 22); *Schmitz,* 867 N.E. 3d at 864-65.

STATEMENT OF FACTS

This case arises from the NCAA's and Notre Dame's reckless disregard for the safety of amateur collegiate football players generally and specifically for the safety of the Decedent, Steve Schmitz, a former running back and receiver for the Notre Dame football team between 1974 and 1978. Complaint at ¶ 1 (P-A App. 50).

When Steve Schmitz played football at Notre Dame, he was exposed – like all other Notre Dame and NCAA football players – to the risk of developing long-term brain disease caused by concussive hits to the head. Complaint at ¶¶ 127-128 (P-A App. 77).

At no time, however, either during college or for many years after he played football, did Steve Schmitz ever know or realize he had been exposed to the risk of latent brain disease caused by concussive blows to the head during football. Complaint at ¶¶ 22, 129 (P-A App. 54, 77). When Steve Schmitz was a player, neither he nor the football leadership of Notre Dame ever recognized that he sustained a head injury of any kind. Complaint at ¶ 68 (P-A App. 64). At no time did Notre Dame ever test or examine Steve Schmitz for concussion symptoms or advise or educate him about what a concussion was or what concussion symptoms were. Complaint at ¶ 67 (P-A App. 64). At no time were any symptoms that Steve Schmitz experienced recognized by him or Notre Dame as an injury that should be monitored, treated, or even acknowledged. Complaint at ¶¶ 64-65 (P-A App. 64). At no time during his participation on the Notre Dame

football team was Steve Schmitz in a position to understand or appreciate the risks of concussive and sub-concussive impacts. Complaint at ¶ 18 (P-A App. 53-54).

Instead, Steve Schmitz relied upon the guidance, expertise, and instruction of both Notre Dame and the NCAA regarding the serious and life-altering medical issue of concussive and sub-concussive risk in football. Complaint at ¶ 124 (P-A App. 76). At all times, Appellants had superior knowledge of material information regarding the effect of repetitive concussive events. Complaint at ¶ 125 (P-A App. 76). Because such information was not readily available to Steve Schmitz, Appellants knew or should have known that Steve Schmitz would act and rely upon the guidance, expertise, and instruction of Appellants on this crucial medical issue, while at Notre Dame and thereafter. Complaint at ¶ 125 (P-A App. 76). Given Appellants' superior knowledge and unique vantage point, Steve Schmitz reasonably looked to and otherwise relied upon Appellants for guidance on health and safety issues, such as disclosing to him information, precautionary measures, and warnings about concussions, including the later-in-life consequences of repetitive head impacts he sustained while a football player at Notre Dame. Complaint at ¶ 138 (P-A App. 79).

As to Appellants' mischaracterization of the Complaint as stating a known injury, the Complaint, in pertinent part, states as follows:

> 65. At no time, however, were the symptoms that Steve Schmitz demonstrated recognized by him or the Notre Dame Coaching Staff as an injury that should be monitored, treated, or even acknowledged.
>
> * * *
>
> 68. At no time while Steve Schmitz played football at Notre Dame did either he or any football program staff recognize that Steve Schmitz sustained an injury to the head that required treatment, rest or therapy.

Complaint at ¶¶ 65 and 68 (P-A App. 64).

The Complaint does not state that Steve Schmitz knew he was ever injured or experienced symptoms of a brain injury that would have put him on notice or would have inspired him to go to a clinic or hospital. The Complaint alleges that the blows to the head Steve Schmitz sustained (like any other Notre Dame football player) did not create the actual injury that is the subject of the case, but rather exposed him to the risks of latent and long-term brain disease with which he was diagnosed decades later.[6] *See* Complaint at ¶¶ 20-22, 62, 126 – 129 (P-A App. 54, 63, 76-77).

Specifically, the Complaint states:

> 126. Repetitive concussive and sub-concussive impacts during college football practices and games has a pathological and latent effect on the brain. Repetitive exposure to accelerations to the head causes deformation, twisting, shearing, and stretching of neuronal cells such that multiple forms of damage take place, including the release of small amounts of chemicals within the brain, such as Tau protein, which is a signature pathology of CTE, the same phenomenon as boxer's encephalopathy (or "punch drunk syndrome") studied and reported by Harrison Martland in 1928.
>
> 127. Plaintiff Steve Schmitz experienced repetitive sub-concussive and concussive brain impacts during his college football career that significantly increased his risk of developing neurodegenerative disorders and diseases, including but not limited to CTE, Alzheimer's disease, and other similar cognitive-impairing conditions.
>
> 128. The repetitive head accelerations and hits to which Steve Schmitz was exposed presented risks of latent and long-term debilitating chronic illnesses. Absent the defendant's negligence and concealment, the risks of harm to Steve Schmitz would have been materially lower, and Steve Schmitz would not have sustained the brain damage from which he currently suffers.
>
> 129. The repetitive head impacts and MTBI Steve Schmitz sustained while playing football at Notre Dame resulted in neuro-cognitive and neuro-behavioral changes over time in Steve Schmitz. Now, at age 58, Steve Schmitz is permanently disabled based on the latent effects of neuro-cognitive and neuro-

[6] Appellants argue that the latent brain disease Steve Schmitz developed late in life is in fact the same injury as the concussive hits to the head Steve Schmitz and every Notre Dame football player sustained during practices and games. *See* Appellants' Brief at 3-4. Appellants are wrong, and the argument raises a disputed issue of a scientific fact that is subject to discovery.

> behavioral injuries he sustained while playing football at Notre Dame. The latent injuries sustained by Steve Schmitz developed over time and were manifest later in life. They include, but are not limited to, varying forms of neuro-cognitive disability, decline, personality change, forgetfulness, early onset Alzheimer's Disease, and CTE, all of which will require future medical care.

Complaint at ¶¶ 126 – 129 (P-A App. 76-77) (emphasis added). *See also* Complaint at ¶¶ 41, 62, 160-161 (P-A App. 58, 63, 84).

The Complaint puts the Appellants on notice that this case is about (1) Appellants' negligent or willful exposure of college football players to an elevated risk of long-term latent brain disease and (2) the manifestation of that brain disease in Steve Schmitz decades after he left college. In that way, the Complaint is not materially different from the pleadings the Court would expect in toxic exposure cases such as those cited below and in Appellants' Brief at pages 16 to 20. Those exposure cases allege an exposure (recognized by the plaintiff at the time it occurred) and then a disease or toxic condition manifest many years later directly caused by the earlier exposure.

Soon after Steve Schmitz graduated from college, he stopped playing football and obtained employment in various companies within the Cleveland area. Complaint at ¶ 19 (P-A App. 54). Decades later, on or around December 2012, Steve Schmitz was diagnosed by the Cleveland Clinic Neurology Department, a competent medical authority, with CTE, the signature latent brain disease of football. Complaint at ¶¶ 20-21 (P-A App. 54). At the time of the diagnosis, Steve Schmitz was 57 years old and unemployable. He suffered from severe memory loss, cognitive decline, early onset Alzheimer's disease, CTE, and dementia. Complaint at ¶¶ 20-21 (P-A App. 54).

For these reasons, only when Steve Schmitz received a diagnosis of neurodegenerative brain disease, more specifically CTE, caused by football did he know that he had sustained

undiagnosed and unrecognized concussive blows to the head as a Notre Dame football player that resulted many years later in a latent brain disease. Complaint at ¶¶ 22, 129 (P-A App. 54, 77). Prior to the diagnosis, Steve Schmitz did not know and had no grounds to believe that he had suffered a latent injury caused by football or that he had a civil claim against the Appellants. Complaint at ¶¶ 22, 129 (P-A App. 54, 77).

ARGUMENT

The Appellants misstate the case by alleging that Steve Schmitz knew he sustained an injury when he was in college and was on notice then that he had a civil claim against the Appellants. This is not true. The Appellants bend the facts to suit a misbegotten argument that on its face is false. This case is nothing like *Pingue v. Pingue*, and the Panel in the Eighth District understood that. The *Pingue* plaintiff knew he was subjected to wrongful criminal assault for decades by the same identified perpetrator. He knew from the beginning that he had serious injuries wrongfully caused by a specific person, who should be subject to criminal prosecution. Here, Steve Schmitz never even knew he had an injury. He never knew that the Appellants had acted wrongfully by withholding information, failing to warn him, and failing to put in place any sort of medical protocol to address head impacts in football. He never knew that the Appellants knew or should have known to warn and protect him against the possibility of long-term latent brain disease from head impacts. Rather, Appellant Notre Dame actively encouraged him and other Notre Dame football players to lead with their helmets and inflict on themselves and each other concussive and sub-concussive head impacts that can, in some players, lead to long-term neurodegenerative disease. The Appellants have known this since at least 1933 but did nothing. *See*, *e.g.,* Complaint at ¶134 (P-A App. 78).

For those reasons, Mr. Schmitz brought his claims timely, within eighteen months of his diagnosis with CTE[7], and the Panel for the Eighth District properly applied Ohio's long-standing discovery rule this Court has applied in many toxic exposure cases. That issue is addressed below in Section I.

As to Appellants' argument that the statute of limitations for fraud does not apply here, which is addressed in Section II, the Eighth District correctly concluded that it does not matter what statute of limitations applies because, regardless, the discovery rule applies and the Complaint was timely filed.

I. Response to Proposition of Law No. 1:

1. The Panel's Decision Does Not Expand Ohio's Discovery Rule.

This is not a case of a plaintiff suing a defendant over a known injury that worsened over time. The Panel rejected that argument and held that it is not a fair reading of the Complaint.[8] Here, on appeal, the Appellants continue to misconstrue the Complaint and claim that Steve Schmitz knew of an actual injury at least by age 22. The Complaint does not say that, and nothing in the Complaint supports that inference. Rather, the Complaint expressly states that Steve Schmitz never knew he had an injury of any kind and never knew he had been exposed to the risk of a latent brain disease until he was diagnosed by a neurologist in late 2012. *See*

[7] Prior to filing their Complaint in Cuyahoga County in October 2014, Plaintiffs first filed suit against Defendants in the United States District Court for the Northern District of Ohio in June 2014 (P-A App. 95-132), which was dismissed without prejudice pursuant to stipulation of the parties (P-A App. 133).

[8] The Eighth Appellate District found that the Complaint states that Schmitz never knew he had an injury and did not know the cause of the injury until the Cleveland Clinic Neurology Department diagnosed him with a latent brain disease caused by football in late 2012. *See* P-A App. 14); *Schmitz,* 867 N.E. 3d at 861.

Complaint at ¶¶ 18, 22, 64-68, 129 (P-A App. 53-54, 64, 77).[9] *See also* P-A App. 14; *Schmitz,* 867 N.E. 3d at 861. *See also* Complaint at ¶¶ 18, 22, 64-68, 129 (P-A App. 53-54, 64, 77).

The Appellants' argument defies logic and the law of Ohio. Steve Schmitz affirmatively pleaded that he never knew he had sustained any injury or any risk of exposure to a latent brain disease. In light of those allegations, the Appellants are not permitted to conjure up a contrary reading to support a self-serving argument. All inferences must be construed in favor of Steve Schmitz, not the Appellants, and the Panel below properly drew those inferences in reversing the trial court's dismissal of the Complaint.

Further, the Panel saw the case the same way this Court saw *Liddell v. SCA Services of Ohio, Inc.*, 70 Ohio St. 3d 6, 635 N.E.2d 1233 (1994), a seminal decision that applied the discovery rule to a latent disease case. In *Liddell*, the plaintiff police officer was exposed to toxic fumes when he escorted a school bus full of children to safety through the toxic cloud caused by a leak from an overturned truck. He experienced extensive symptoms and was hospitalized. He returned to work, and filed a workers' compensation claim for his medical bills

[9] The Complaint is clear. It states that Steve Schmitz was exposed – like all other Notre Dame and NCAA football players – to the risk of developing long-term brain disease caused by concussive hits to the head in football. Complaint at ¶¶ 127-128 (P-A App. 77). It also states that at no time, either during college or in the decades after he played football, did Steve Schmitz ever know or realize he had been exposed to the risk of latent brain disease caused by concussive blows to the head during football. Complaint at ¶¶ 22, 129 (P-A App. 54, 77). Neither Steve Schmitz nor the football leadership of Notre Dame ever recognized that Schmitz had sustained a head injury of any kind. Complaint at ¶ 68 (P-A App. 64). Never did Notre Dame ever test or examine Steve Schmitz for concussion symptoms or advise or educate him about what a concussion was or what concussion symptoms were. Complaint at ¶ 67 (P-A App. 64). At no time were any symptoms that Steve Schmitz experienced recognized by him or Notre Dame as an injury that should be monitored, treated, or even acknowledged. Complaint at ¶¶ 64-65 (P-A App. 64). Instead, Steve Schmitz relied upon the guidance, expertise, and instruction of both Notre Dame and the NCAA regarding the serious and life-altering medical issue of concussive and sub-concussive risk in football, complaint at ¶ 124 (P-A App. 76), because NCAA and Notre Dame had superior knowledge regarding the effect of repetitive concussive events, complaint at ¶ 125 (P-A App. 76).

based on the inhalation of fumes. *Id.*at 6. Within nine months, Liddell sustained sinus infections. *Id.* at 7. Six years after the exposure, a surgeon removed a benign tumor from Liddell's sinus cavity that revealed cancer. Although Liddell was fully aware that he had been exposed to toxic fumes from the outset, he filed suit for negligence based on the latent disease of cancer, diagnosed six years later. The trial court granted a motion to dismiss based on the two year statute of limitations, and the Appellate Court affirmed. This Court reversed, and applied Ohio's discovery rule. The Court held that Liddell's cancer did not manifest itself until many years later, so Liddell could not have discovered the injury before the two-year statute of limitations had expired. *Id.* at 13.

This Court also observed that if Liddell had attempted to bring a cause of action for negligence before the manifestation of the cancer, any damages for cancer would have been too speculative and impossible to prove. Imposing such a formulation on the plaintiff would be inherently unfair. *Id.* This Court stated that

> the procedural dilemma confronting a plaintiff in cases where a long latency conflicts with a short statute of limitations provides the plaintiff with only an illusory opportunity to litigate his or her claim. Under these circumstances, to deny the plaintiff a genuine opportunity to pursue a cause of action against a defendant now is patently unfair.

Id.[10]

[10] *See also Colby v. Terminix Int'l Co., L.P.*, 5th Dist. Stark No. 96-CA-0241, 1997 WL 117218 (Feb. 10, 1997). The facts of *Colby* are consistent with those of *Liddell*. In *Colby*, the plaintiff developed a symptom, laryngitis, after defendant Terminix sprayed her workplace with chemicals. The plaintiff pursued a specialist after the exposure and laryngitis, and the specialist provided a diagnosis that the plaintiff had developed a chemical sensitivity to the chemicals sprayed by Terminix, which had caused her symptoms. *Id.* at *1-2. When faced with the question of when the limitation period began to run, the appeals court reversed a grant of summary judgment in favor of the defendant and applied the discovery rule of *O'Stricker, infra.* The appeals court held that a mere suspicion of a connection between a symptom and the cause of a symptom is insufficient to commence the running of the limitation period without a firm diagnosis by a competent medical authority. *See id.* at *2-3.

The Panel below correctly applied the same reasoning to this case. Like the police officer in *Liddell*, prior to his diagnosis with CTE, Steve Schmitz did not know that he had been exposed to the risk of a latent brain disease caused by football or that he would be diagnosed with that latent brain disease at age 57. *See* Complaint at ¶¶ 20-22 (P-A App. 54) (stating that prior to December 31, 2012, when he was diagnosed with traumatic encephalopathy, "Steve Schmitz did not know and had no grounds to believe that he had suffered a latent injury caused by playing football"). Distinct from *Liddell*, Steve Schmitz did not even know he had sustained an injury at all. Not until he received the diagnosis from the Cleveland Clinic did he know that he had an injury from football, that he had a latent disease, and that he had a claim. At that point, the Panel ruled, the limitations period began to run on his claims. Plaintiffs' Complaint was then timely filed within two years after he received his diagnosis from the Cleveland Clinic.

2. <u>This Case is Not in Conflict with *Pingue v. Pingue*</u>.

The Panel properly distinguished *Pingue* from this case for the obvious reason that *Pingue* involved a completely different set of facts. In that case, the plaintiff was fully aware over the course of 28 years that he had been the victim of repeated criminal assaults by a known perpetrator (his father), and that the assaults had caused ongoing bodily injury and harm. (P-A App. 18-19); *Schmitz,* 867 N.E. 3d at 863. That is not true here. The Complaint shows that Steve Schmitz never thought he sustained an injury at all, never thought there was wrongful conduct, never thought the NCAA and Notre Dame were possible malefactors, and never thought at age 22 that he would develop latent brain disease (decades later) caused by football. *See* note 8, *supra*.

The arguments Appellants advance are, again, based on their self-serving misreading of the Complaint. They argue that Steve Schmitz knew of an injury when he was in college, yet the Complaint states the opposite. *See* Complaint at ¶ 129 (P-A App. 77) ("At no time prior to being diagnosed in December 2012 was Steve Schmitz aware that he had sustained a brain injury as a result of football."). Appellants advance the mistaken argument that the latent brain disease Steve Schmitz developed is merely a more expanded version of the allegedly known concussive and sub-concussive injuries (never identified and diagnosed) he must have suffered at Notre Dame. The argument is mistaken because Schmitz never knew he had sustained any injury at all. It is mistaken, because the Appellants have raised a scientific issue not yet subject to discovery, so dismissal at the pleadings stage is not permitted under Ohio law. The argument is also mistaken, because if Steve Schmitz never recognized he had an injury at all, he is completely different from the plaintiff in *Pingue* or the myriad of other criminal assault cases the Appellants cite to this Court.

Rather, Steve Schmitz is like the plaintiff in *Liddell*, who was unaware of his cancer until six years after he had been exposed to toxic fumes. Like the plaintiff in *Liddell*, Steve Schmitz is suing based on his diagnosis at Cleveland Clinic at age 57.[11] Unlike the plaintiff in *Pingue*, Schmitz never knew he had sustained any injury at all, whereas the plaintiff in *Pingue* knew of the wrongful conduct and harm caused by a known perpetrator for 28 years before he sued.

As a result, there is no conflict with *Pingue* at all. Rather, the Appellants seek to manufacture a conflict by misconstruing the Complaint's allegations and seeking to conflate them with the facts of *Pingue*.

[11] It is no fault of Steve Schmitz that the latent brain disease from which he suffered took decades to manifest, and the Appellants should not be allowed to benefit from the fact that the brain disease at issue took decades to develop.

3. The Panel's Opinion is Consistent with Ohio's Discovery Rule.

The Appellants try to argue that the Schmitz Complaint should not gain the benefit of Ohio's well-established discovery rule as applied to latent disease cases. They assert, as they have for three years, facts that are not within the Complaint. They mischaracterize this case as one involving a known injury (which it is not) with symptoms that manifested decades ago (they did not) and constitute (allegedly) the "latent *effects* of already-known injuries." *See* Appellants' Brief at 14. On top of that mischaracterization, the Appellants argue that the Complaint is a stale claim that should be suppressed under Ohio jurisprudence.

First, the Appellants' characterizations of the Complaint are inconsistent with what the Complaint actually says. The Panel below agreed, and held that the Complaint states a claim for "an injury in the form of CTE and other neurological diseases that did not manifest until decades after Schmitz stopped playing." (P-A App. 14); *Schmitz,* 867 N.E. 3d at 861. Contrary to Appellants' arguments, the Complaint is not a claim for "the latent *effects* of already-known injuries." It is a classic latent disease case, and the Panel agreed.

Second this Court's opinions in latent disease cases show how Ohio's discovery rule applies in a case like this. In *Liddell* and many other cases, this Court set forth precisely how the discovery rule of *O'Stricker v. Jim Walter Corporation*, 4 Ohio St.3d 84, 87, 447 N.E.2d 727 (1983), prevents the manifest injustice the Appellants seek here. In *O'Stricker,* this Court stated that in some situations "application of the general [statute of limitations] rule 'would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of [the claim's] existence.'" *Id.* at 87 (quoting *Wyler v. Tripi*, 25 Ohio St. 2d 164, 168, 267 N.E. 2d, 419 (1979)). Here, Appellants want the claim brought by Steve Schmitz to be barred decades before he ever knew he had an injury, a latent disease, or a

claim.[12]

In a seemingly desperate attempt to escape the clear Ohio law regarding latent diseases, Appellants cite the dictionary definition of the term "manifest" and two out-of-state cases which reference the term "manifested," but are otherwise completely irrelevant with references taken out of context. *See* Appellants' Brief at 16-17. The first case cited, *Bridges v. Astrue*, No. 3:11-CV-06046-AC, 2012 WL 4322735 (D. Or. June 5, 2012), involved a social security disability benefits finding and the quote parenthetically cited by Appellants was from a doctor's testimony regarding the claimed disability. The second case cited, *Cortrim Manufacturing Co.*, 570 S.W. 2d 854 (Tenn. 1978) involved the approval of worker's compensation death benefits for someone who died on the job from a heart attack, but had heart issues that had manifested prior to that time, which the Court found irrelevant and approved the claim. Neither case involved when a latent injury or disease manifests for purposes of triggering Ohio's statute of limitations.

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[12] To hold Plaintiffs to such a standard is not only inequitable to Plaintiffs in this case, but it could also potentially bar all similar claims brought by all former football players, effectively violating the right-to-remedy provision of the Ohio Constitution. *See Burgess v. Eli Lilly & Co.*, 66 Oh. St. 3d 59, 61, 64, 609 N.E. 2d 140 (1993) (finding specific statute of limitations for DES claimants requiring claims to be filed after learning they "*possibly*" have a DES-related injury was unconstitutional, applying the *O'Stricker* discovery rule to such claims and observing that "[t]here is more than a semantic difference between knowing that one has a DES-caused injury and knowing that one *may* have such an injury. A degree of certainty is missing. Knowledge of the possibility that an injury may be related to a specific cause simply does not reach the constitutionally mandated threshold granting every person a remedy in due course of law for an injury done.").

Appellants, nevertheless, suggest that "any unfairness is mitigated by the fact that plaintiffs can sue to obtain damages for future harms." *See* Appellant's Brief at 26-27. The case cited by Appellants in support of this proposition involves when future damages can be awarded and states that, "[i]n Ohio, a plaintiff is entitled to an award of damages to compensate him for *losses which he is reasonably certain to incur in the future*." *Galayda v. Lake Hosp. Sys., Inc*., 71 Ohio St. 3d 421, 425, 644 N.E. 2d 298 (1994) (emphasis added) (citation omitted). At the time he graduated from Notre Dame, it would have been impossible for Steve Schmitz to show that it was "reasonably certain" he would one day develop CTE, especially since Appellants failed to warn him and concealed knowledge of the risks from him as alleged throughout the Complaint.

The Panel below provided citations to cases outside of Ohio that addressed the same or similar arguments in the same context: a motion to dismiss a sports-related latent brain injury claim based on the statute of limitations. (P-A App. 12-14); *Schmitz,* 867 N.E. 3d at 860-61. Those courts (federal district courts in Minnesota and Connecticut) came to the same conclusion as the Panel below. They found that in a latent brain injury case when and how that injury became manifest and known were subjects of discovery, and the claim should not be subject to a motion to dismiss.[13] Those courts applied their respective state discovery rules in the same way this Court applied Ohio's discovery rule in *Liddell*, and the Panel below applied the reasoning in *Liddell* to *Schmitz*. There is nothing unusual or uncertain about those rulings and nothing unusual or uncertain about Ohio's jurisprudence on that subject.

Liddell is instructive. The plaintiff police officer in *Liddell* collapsed, went to a hospital, and received treatment for toxic fume inhalation. That was his known and immediate injury at the time of exposure. Six years after the accident, a surgeon removed a benign tumor from Liddell's sinus cavity that was cancerous. *Liddell*, 70 Ohio St.3d at 13. In reversing the grant of summary judgment in favor of the defendant, this Court applied the *O'Stricker* discovery rule

[13] *See In re NHL Players Concussion Injury Litigation*, D. Minn. No. MDL 14-2551 SRN, 2015 WL 1334027 (Mar. 25, 2015). In that case, the NHL, like the Appellants here, filed a motion to dismiss and argued that the statutes of limitations periods began to run on the dates on which the plaintiffs' head injuries occurred. The NHL argued that "the fact that those injuries may have progressed into more complicated medical conditions does not re-start the limitations period." *Id.* at *5 (citation omitted). The District Court in Minnesota denied the NHL's motion and reasoned that how and when the alleged brain disease occurred and developed were matters that could not be determined from the face of the complaint and are proper subjects of discovery. *Id.* at *6-7. *See also, McCullough v. World Wrestling Entertainment, Inc.*, 172 F. Supp. 3d 528, 547 (D. Conn. 2016) (denying motion to dismiss on statute of limitations grounds, rejecting the defendants' argument that the claims accrued on the date of the concussive head impacts, and stating, "[a] single [Mild Traumatic Brain Injury ('MTBI')] such as a concussion, and the symptoms that a discreet MTBI can manifest, are not the same 'condition' as a disease such as CTE or another degenerative neurological disorder that may – or may not – be caused by repeated MTBIs").

and reasoned that Liddell's cancer and its connection to the toxic exposure went undetected for over six years. Liddell could not, and did not, discover the cancer before the two-year statute of limitations governing bodily injuries had expired. The Court rejected the defendants' rigid application of the statute of limitations and stated that under the discovery rule "it is not unfair to expect the defendant to defend this type of cause of action….[and] to deny the plaintiff a genuine opportunity to pursue a cause of action against a defendant now is patently unfair." *Liddell*, 70 Ohio St.3d at 13.

This too is an exposure and latent disease case. The Complaint states that from 1974 to 1978, Steve Schmitz was exposed to an elevated risk of long-term brain damage, but did not recognize that he has sustained any exposure or injury at all. *See, e.g.,* Complaint at ¶¶ 1, 127-129 (P-A App. 50, 77). Under Ohio law, Steve Schmitz should benefit from the Ohio discovery rule just as the police officer did in *Liddell*. If the opposite were true, Steve Schmitz would have been required to sue two years after his last Notre Dame football game, even though he had no symptoms or brain disease or a diagnosis of any kind. This is the Appellants' argument. They seek to eviscerate Ohio's discovery rule for these kinds of cases and impose a new rule that would have required Steve Schmitz to file a lawsuit decades before he had brain disease or any claim at all. This would turn the reasoning of *O'Stricker* and *Liddell* on its head.

4. The Panel's Opinion is Consistent with Established Supreme Court Precedent on Motions to Dismiss.

Under the law of Ohio, unless the Complaint pleads averments that prove beyond doubt that under no set of facts could the plaintiff ever recover for his claim, a motion to dismiss must be denied. *Vandemark v. Southland Corp.*, 38 Ohio St.3d 1, 7, 525 N.E.2d 1374 (1988) (affirming denial of motion to dismiss where complaint did not show beyond doubt that the plaintiff's cause of action was time-barred); *Tarry v. Fechko Excavating, Inc.*, 9th Dist. Lorain

No. 98CA007180, 1999 WL 1037755 (Nov. 3, 1999) (reversing and remanding judgment for defendant on motion to dismiss because the face of the complaint set forth facts upon which the plaintiff could recover, and applicable statute of limitations was tolled until plaintiff discovered the wrongdoer). For that reason, this Court has stated that "[a] motion to dismiss a complaint under Civ. R. 12(B) which is based upon the statute of limitations is erroneously granted where the complaint does not conclusively show on its face the action is barred by the statute of limitations." *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 379, 433 N.E.2d 147 (1982) (citations omitted).

Here, the Complaint pleads a latent undiscoverable brain disease that became manifest and diagnosable decades after Steve Schmitz played football. The cause of the injury was discovered only after (a) the symptoms became manifest and (b) a competent medical authority diagnosed the condition. For those reasons alone, the Complaint does not on its face show beyond doubt that the Plaintiffs cannot recover based on a statute of limitations defense. To the contrary, the record and Complaint show the opposite. Steve Schmitz filed his original Complaint approximately eighteen (18) months after he received the diagnosis from the Cleveland Clinic Neurology Department. For those reasons, the trial court's ruling was error and contrary to the law of Ohio. Discovery, which the lower court prevented by an erroneous ruling, will show that Steve and Yvette Schmitz became aware of the injury, the diagnosed medical cause, and the wrongdoer in December 2012 and filed their Complaint well within the two year limitation period.

5. Lapse of Time is Not a Barrier to Fair Prosecution.

Appellants argue that lapse of time is a significant barrier to a fair litigation and trial of this matter. *See* Appellants' Brief at 27-32. The Appellants even speculate (without any facts or

discovery) that Steve Schmitz was less than diligent in pursuing his diagnosis. This argument is unfounded. This Court's jurisprudence clearly shows that in latent a diagnosis case, the statute of limitations begins to run when the plaintiff obtains a diagnosis from a qualified physician that establishes the injury and its cause. It is not enough to have a lingering symptom or suspicion (as in *Liddell* and *Colby*, *supra*). Only when in the exercise of due diligence the plaintiff obtains a diagnosis from a competent specialist will the limitation begin to run. There is no evidence at all that Steve Schmitz was less than diligent. There is also no evidence that he should have obtained a diagnosis from a qualified and competent neurologist before late 2012.

The argument is also unfounded because it is Plaintiffs who are disadvantaged, not the Appellants. Severely brain damaged and now deceased, Mr. Schmitz was not and is not available to prosecute his own case. Most of his teammates, however, are still alive. Many members of the coaching staff may also still be alive, notwithstanding the obituary, which is outside the appellate record, cited by Appellants on appeal to this Court. Many players before and after Steve Schmitz played at Notre Dame are alive. All should be available to testify about what happened in practices and games. They can testify about the information (there was none) imparted to players about the risks of head injuries and the medical protocols (there were none) set up to address the concussed or disoriented player on the sidelines and in locker rooms. Even Notre Dame counsel Matthew A. Kairis, who played football at Notre Dame in the 1980s, is available to testify about the way practices and games were conducted at that time and the information provided to players. Contemporary coaches and players are available to testify about when medical protocols designed to avoid and mitigate brain injury were first implemented (both by the NCAA and by Notre Dame).

Further, every Notre Dame game and practice was probably filmed, and those films were probably preserved in archives and/or converted to digital records. That documentary evidence would certainly be illuminating and a substantial part of the record in discovery. It would belie the Appellants' plea that no one and nothing is available with which they might recall what happened on the field, on the sidelines, and in the locker room, if anything, to keep football players safe. *See* Appellants' Brief at 29-30.[14]

Finally, much of the wrongful conduct and the events that gave rise to the risk of latent disease took place within Note Dame and the NCAA and on the practice and game fields. It is reasonable to predict that Notre Dame and NCAA still have documents, archives, and the practice and game films in their possession. As a result, there is no reason to think the Appellants will suffer in this case from the loss of evidence. To the contrary, the only loss of evidence involves the memory of Steve Schmitz and his ability to testify.

6. Steve Schmitz Showed Due Diligence in Obtaining a Diagnosis from a Competent Medical Authority.

The Appellants make the spurious and speculative argument that even if the discovery rule applies, Steve Schmitz should have discovered his diagnosis long before December 2012. Appellants' Brief at 34. There has been no discovery, so there is no factual record to support this assertion, but the Appellants make it anyway. The Appellants' argument is that Steve Schmitz' condition was allegedly so advanced in 2012 that allegedly he must have known earlier (by at least 2010) that he had a brain disease, that it was a brain disease caused by football, and that it

[14] At this juncture, Appellants' blanket assertion that they are somehow prejudiced because this is a case "in which proof will consist of witness testimony rather than documentary evidence" *see* Appellants' Brief at 30, is curious given that Plaintiffs have not yet had the opportunity to engage in discovery to learn whether or not Appellants or any third parties possess documentary evidence relevant to Plaintiffs' claims.

was CTE, not some other condition that might have been the result of something else. *See* Appellants' Brief at 35-37. *See also* Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellants (hereinafter "OACTA Brief") at 6 ("Although OACTA does not take a position on the exact date on which Schmitz's statute of limitations . . . with reasonable diligence the statute of limitations would have been triggered prior to his CTE diagnosis in 2012.").[15] This is, of course, classic second-guessing by the Appellants, without regard to what the law actually says and without regard to the fact that no discovery at all has taken place. It is a subject of discovery and, possibly, a factual dispute to be submitted to a jury.

Nevertheless, the Appellants argue that in 2010, there was enough public information about concussions in football and CTE as a latent disease (Appellants cite to the Complaint) that Steve Schmitz must have known all of this and should have sought a medical diagnosis at that time. *See* Appellants' Brief at 37. The allegations of the Complaint that relate to medical knowledge of the effects of concussive injury are, of course, directed to the Appellants. *See, e.g.,* Complaint at ¶¶ 69-101 (P-A App. 64-71). As educational institutions with clear duties to

[15] In support of their assertion that Plaintiffs did not act with reasonable diligence and that "a formal medical diagnosis is not needed to trigger the two-year statute of limitations," the OACTA cites cases that are clearly distinguishable in that they both involved summary judgment dismissals based on actual evidence, obtained through discovery, showing that the plaintiffs did not act with reasonable diligence; they did not involve motions to dismiss on the pleadings like the instant case. *See* OACTA Brief at 5-6, *citing Gibbons v. Park Poultry, Inc.*, 5th Dist. Stark No. 2006CA00296, 2007-Ohio-4248 (affirming summary judgment based on statute of limitations where the plaintiff "was first diagnosed with asthma in 1991, the year the chicken facility started operating," and "[a]lthough she never asked her physicians as to any causal connection between such illness and [the chicken plant's] operations, she "readily admitted," during her deposition testimony and in an earlier letter sent to the Board of Health, that she "suspected that her health problems were caused by her proximity to the chicken plant"); and *Charter One Bank v. Hamburger*, 6th Dist. Lucas No. L-01-1332, 2002-Ohio-74 (affirming summary judgment on statute of limitations grounds in case involving "sick building syndrome" and stating that question of when the plaintiff discovered her injuries "can be answered by way of statements made by [the plaintiff] and contained in the record").

protect the health and safety of student-athletes, they were charged with understanding the health risks of football to Steve Schmitz, not the other way around. *See, e.g.,* Complaint at ¶¶_116-120 (P-A App. 74). Indeed, nothing in the Complaint states that Steve Schmitz ever possessed such knowledge or understanding.

Even if Steve Schmitz had memory problems in 2010, it would depend on how bad they were, and what a physician might have said to him about whether such problems may have resulted from playing college football. Only when a competent medical authority diagnosed him with CTE, and he knew he had a claim, did the limitations period begin to run. Complaint at ¶¶ 20, 22 (P-A App. 54). Speculate as the Appellants might, nothing would have put Steve Schmitz on notice that he had CTE until the Cleveland Clinic Neurology Department rendered the diagnosis. Certainly, there is nothing in the Complaint that would lead to that conclusion. When discovery takes place, the Appellants will find out, and the Plaintiffs also will discover what the Appellants knew, when they knew it, and what they did about it.

For those reasons, the Panel did not err. It took the allegations of the Complaint as true, applied Ohio's discovery rule properly, and left to the discovery process the speculative questions raised by the Appellants in their opening Brief.

II. Response to Proposition of Law No. 2:

Appellants next seek reversal of the Eighth District's finding that Plaintiffs' fraud claims are governed by Ohio's four-year statute of limitations for fraud claims set forth in R.C. 2305.09. More specifically, Appellants assert that the "real purpose" of Plaintiffs' claims is to recover for bodily injuries and, therefore, Ohio's two-year statute of limitations set forth in R.C. 2305.10(A) should apply to both Plaintiffs' bodily injury and fraud claims. *See* Appellant's Brief at 38-39. This is a red herring.

Appellants spend nearly ten pages of their opening brief diverting attention to the legislative history of Ohio statutes of limitations, canons of statutory construction and interpretation and the difference between general versus specific statutes of limitations for various causes of action under Ohio law. In doing so, Appellants make much of nothing. Even if this Court agrees that all of Plaintiffs' claims are governed by R.C. 2305.10(A)'s two-year statute of limitations for bodily injury claims, such a conclusion is not dispositive because *all* of Plaintiffs' claims were filed within two years of Plaintiffs' discovery of the injury (*i.e.*, Steve Schmitz's diagnosis with CTE). Thus, regardless of whether Plaintiffs' claims were ones to recover for bodily injury or for fraud, they were *all* timely filed as explained in more detail above in response to Appellants' first proposition of law.

Although Appellants' second proposition of law is essentially a non-issue and Plaintiffs do not find it is necessary to travel down the rabbit hole of Appellants' argument, Plaintiffs note the following. In support of their argument, Appellants heavily rely upon *Andrianos v. Community Traction Co*, 155 Ohio St. 47, 97 N.E.2d 549 (1951). In *Andrianos*, the Court considered whether to apply the two-year statute of limitations for bodily injury claims or the six-year statute of limitations for contract claims to the plaintiff's claims. In *Andrianos*, the Court ultimately concluded that "[i]t is manifest from a perusal of the amended petition that this is an action for damages upon a claim for bodily injury," but that the action was not filed within two years from the date liability arose, and, therefore, it affirmed the Court of Common Pleas' dismissal of the amended petition. *Id. at 53.*

Appellants assert that the Eighth District reached its conclusion that the four-year statute of limitations applies to Plaintiffs' fraud claims "[w]ithout even mentioning *Andrianos"* and other precedent of this Court "which directs courts to look at the 'essential character' of the

claims, not their form." *See* Appellants Brief at 39 (citations omitted). Contrary to that assertion, the Eighth District *did* consider such precedent, albeit without specifically citing *Andrianos*, reasoning and concluding as follows:

> While Ohio courts have recognized that a plaintiff cannot couch a claim for bodily injury as a fraud claim simply as a means to extend the statute of limitations, this is not the case here. Plaintiffs' fraud claims are separate and distinct from the other claims—not merely a vehicle to extend the statute of limitations on plaintiffs' negligence/personal injury action. *See Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 56, 514 N.E. 2d 709 (1987) ("As a cause of action separate and distinct from medical malpractice, a claim for fraud is subject not to the medical malpractice statute of limitations * * * but rather the four-year limitations period for fraud.") But regardless of what statute of limitations apply in this case, the claims are not time-barred because the discovery rule applies.

(P-A App. 22)); *Schmitz,* 867 N.E. 3d at 864-65. (Emphasis added).

In *Gaines* (the case cited by the Eighth District in its *Schmitz* opinion), the appellant argued that her complaint stated "a cause of action in fraud, separate and independent from malpractice" and that it was timely filed within the four-year statute of limitations for fraud claims set forth in R.C. 2305.09, with which this Court agreed. *See Gaines,* 33 Ohio St. 3d at 55, 514 N.E.2d at 709. Appellants critique *Gaines* because it, too, does not cite *Andrianos*. *See* Appellants' Brief at 44. Appellants also argue that *Gaines* is not applicable because the Schmitz Plaintiffs' fraud claims are "inextricably tied" to their negligence claims. *See* Appellants' Brief at 44-45 (citing *Knepler v. Cowden*, 2d Dist. Montgomery No. 17473, 1999 WL 1243349, at *9 (Dec. 23, 1999)).

Appellants' reliance on the language of this unreported opinion of the Second District is misplaced. In *Knepler*, the Second District noted that Knepler's claimed misrepresentations by her doctors were "inextricably tied" to her claims for malpractice, and "[a]s such, Knepler was not entitled to pursue her fraud claim separate from her malpractice claim." *Id.* at *9. The issue

in *Knepler*, however, was whether the plaintiff had submitted sufficient evidence to support *prima facie* claims of both fraud and negligence in response to a motion for summary judgment. *See id.* at *8. The issue in *Knepler* was *not* whether to apply the two-year statute of limitations for bodily injury claims to the alleged fraud claims. Rather, the Second District ultimately agreed with the trial court's conclusion that "Knepler had not created a genuine issue of material fact as to whether her doctors had engaged in fraud." *Id.*

Here, by contrast, no discovery has taken place to date, and Plaintiffs have not been asked to submit evidence in support of their claims in opposition to any summary judgment. Instead, Appellants' appeal stems from motions to dismiss Plaintiffs' Complaint. Plaintiffs' Complaint, however, clearly alleges claims of fraud that are separate and distinct from their claims for bodily injuries. Indeed, the Eighth District found that Plaintiffs sufficiently pleaded facts to support claims of both negligence and fraudulent concealment, *see* P-A App. 24-32; *Schmitz,* 867 N.E. 3d at 865-69, and Appellants do not contest those findings on appeal to this Court.

In sum, the Eighth District's opinion should be affirmed. Even if this Court agrees that Ohio's two-year statute of limitations for bodily injury claims applies to Plaintiffs' constructive fraud and fraudulent concealment claims, such a conclusion is not dispositive as *all* of Plaintiffs' claims were brought within two years of the date Steve Schmitz was diagnosed with CTE. The Eighth Districts' decision to remand this case to the trial court was correct and should be upheld.

CONCLUSION

Based on the foregoing reasons, this Court should affirm the Eighth District's decision affirming in part, reversing in part and remanding to the lower court for further proceedings consistent with its opinion.

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Respectfully Submitted,

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PLAINTIFFS-APPELLEES' APPENDIX